Supreme Court U.S
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No. 02-662

In The
Supreme Court of the United States

JOHN EDWARD FISHER,

Petitioner,

v.

MARK HART,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Farmer v. Brennan held that prison officials are not liable for deliberate indifference when, knowing of a risk to an inmate's safety, they reasonably respond to that danger. Should this Court grant certiorari to announce a rule that the courts must judge the reasonableness of a response in light of the circumstances when no reported opinion has failed to do so?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Mark Hart, respectfully requests this Court to deny John Edward Fisher's Petition for Certiorari seeking review of the memorandum decision of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

As the Petitioner notes, Sergeant Mark Hart is the only Respondent implicated in the Petition. Sergeant Hart offers the following in addition to the Petitioner's Statement of the Case.

There is no evidence that any inmate witnessed Sergeant Hart talking with the Petitioner. Nonetheless, Hart agreed to the Petitioner's request to furnish disciplinary paperwork to use as a cover story in case anyone saw their meeting. Pet. App. 7-8.

Contrary to his assertion, the Petitioner did not deny that Sergeant Hart offered to move him to another prison location after their conversation; his supposed refutation of that fact was merely his statement that he could not remember it happening. Pet. App. 8.

There is no evidence that the Petitioner's assailant committed prior acts of prison violence.

The Petitioner was treated for his injury at a Tucson hospital and was released, with his physician noting that "[t]he patient has done well." Dckt. 49, Df. Ex. E.

REASONS TO DENY THE PETITION

The Petitioner urges this Court to grant certiorari for two reasons. He first requests the Court to command the lower courts to give effect to the reasonableness element of *Farmer*'s reasonable-response requirement. Pet. at 14. Second, he urges the Court to reconcile "the circuits' inconsistent approaches to determining whether a prison official's response to a known risk of harm was a reasonable response." *Id.* at 16. Because the applicable rules of law are well defined and there is no conflict regarding their application, the Petition should be denied.

1. The Law Governing Eighth Amendment Analysis Is Well-Settled and Requires No Further Clarification.

The Petition takes aim at *Farmer's* holding that prison officials who know of a substantial risk to an inmate's safety may nonetheless escape liability "if they responded reasonably to the risk, even if harm was not averted." *Farmer v. Brennan*, 511 U.S. 825, 844 (1994). In particular, the Petitioner claims that this Court created a "doctrinal vacuum" by not expressly holding that whether a prison official responded reasonably to a risk should be gauged by the facts and circumstances in each individual case. Pet. at 6. This argument does not give due credit to either this Court's holding or to the lower courts' interpretations of it.

The law governing Eighth Amendment analysis is well-developed. Focusing on its prohibition against cruel and unusual *punishment*, this Court held that only deliberate indifference to an inmate's health or safety, as manifested by "unnecessary and wanton infliction of pain,"

violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Building on *Estelle*, it later held that a prison official cannot inflict punishment in violation of the Eighth Amendment unless he has a "culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Most recently, in *Farmer v. Brennan*, this Court outlined in detail the proper analysis for inmate-on-inmate assault cases:

> [A] prison official cannot be found liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

511 U.S. at 837. It also held that officials escape liability if, knowing of a substantial risk of serious harm, they respond reasonably to the risk:

> In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure "'reasonable safety'". . . .

Id. at 844 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)). This standard, the Court noted, "incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Id.* at 845 (quoting *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979) (Kennedy, J.)). The Court summarized: "Whether one puts it in terms of duty or deliberate

indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.*

The rules of law that governed the Ninth Circuit's opinion are set forth in *Farmer* and its progenitors. There is nothing ambiguous about *Farmer*'s holding that prison officials escape liability if they responded reasonably to a significant risk to an inmate, even if harm was not ultimately averted. Whether prison officials responded reasonably must obviously be evaluated in light of the underlying circumstances, and neither the Ninth Circuit's memorandum decision nor any of the Petitioner's cited cases hold otherwise.

Indeed, the Petitioner cites no case that has ever held that an inquiry into the reasonableness of a prison official's conduct can or should be made without giving due regard to the attendant circumstances. Suggesting otherwise comports with neither common sense nor this Court's jurisprudence. As this Court held – in a Fourth Amendment context – "'[t]he test of reasonableness . . . is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case. . . ." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). There is no suggestion in any of the cases the Petitioner cites that the court ignored the particular facts and circumstances.

2. There Is No Conflict in Interpreting the Reasonable-Response Requirement.

The Petitioner argues that the Ninth Circuit's memorandum decision and opinions from the Seventh and

Fourth Circuits conflict with opinions from other circuits by failing to construe *Farmer*'s reasonable-response holding in light of the surrounding facts and circumstances. Pet. at 8. But he cannot point to any language from these decisions supporting his interpretation.

The Ninth Circuit here held that "Hart took reasonable steps to abate any known risk, including offering to move Fisher out of his unit." Pet. App. 2. The fact that it did not expound at length on the facts is unsurprising, given that it issued a memorandum decision. Memorandum decisions cannot be cited as precedent to or by any court in the Ninth Circuit. 9th Cir. R. 36-3. Thus, they are addressed primarily – if not exclusively – to the parties, who presumably are already familiar with the facts and circumstances.

Furthermore, neither *Lewis v. Richards*, 107 F.3d 549 (7th Cir. 1997), nor *Brown v. Harris*, 240 F.3d 383 (4th Cir. 2001), supports the Petitioner's contention.

The Petitioner claims that "[t]he *Lewis* majority's approach is tantamount to a rule that officials who do *something* in response to the threat have responded reasonably *per se*." Pet. at 8-9. But *Lewis* held no such thing. In fact, *Lewis* does not even mention *Farmer*'s reasonable-response language, other than in passing in the concurrence. 107 F.3d at 556, 557. Instead, the court affirmed summary judgment for prison officials based on their ignorance of the risk: "Lewis has failed to present evidence sufficient for a reasonable factfinder to conclude that the defendants knew of the impending risk to his safety, and consciously refused to prevent it." *Id.* at 555.

The Petitioner also mischaracterizes *Brown*. The court did not, as the Petitioner suggests, "[i]n essence [hold] that

an official who takes *some* action in response to a known risk responds reasonably as a matter of law." Pet. at 10. Instead, it laid out the facts and law in painstaking detail. *See* 240 F.3d at 385-86, 388-90. It then analyzed the actions of the two pertinent appellees in extended detail in light of those facts and circumstances. *See id.* at 390-91.

The Petitioner is wrong in asserting that the Fourth, Seventh, or Ninth Circuits did not apply the *Farmer* test as it was evidently intended: taking into account the facts and circumstances. Like the Fourth Circuit in *Brown*, it must be assumed that the Ninth Circuit here analyzed the reasonableness of Hart's response in light of the underlying facts and circumstances. It performed its job no differently than the courts in the cases that the Petitioner cites as examples of the proper *Farmer* analysis: *Giroux v. Somerset County*, 178 F.3d 28 (1st Cir. 1999); *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997); *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614 (2d Cir. 1996); *Reece v. Groose*, 60 F.3d 487 (8th Cir. 1995).

The Petitioner's criticism therefore concerns not the proper interpretation of *Farmer* but whether the Ninth Circuit properly applied summary-judgment standards and whether in so doing it reached the correct result. This issue does not merit granting certiorari, as we address below.

3. The Petition Does Not Present an Eighth Amendment Question but at Most Argues That the District and Appellate Courts Wrongly Applied the Summary-Judgment Standard.

At best, the Petitioner's position amounts to an argument that the Ninth Circuit made erroneous factual findings or misapplied *Farmer*'s properly stated rule of law. Even if this were true, the Court should not grant certiorari.

Getting past the now-debunked assertion that the circuits have split in their analysis of the *Farmer* reasonable-response rule, the Petition boils down – at best – to an argument that the district court and court of appeals improperly applied the rules governing summary-judgment practice by crediting testimony they should not have credited. The dispute centers on whether the evidence submitted at the summary-judgment phase was sufficient to support the district court's finding that "Hart also offered to move Fisher to another location. Thus, Hart offered Fisher deniability and physical isolation." Pet. App. 10. Hart stated that he offered to move the Petitioner. Excerpts of Record ("ER") 85; 221 ¶ 7. The Petitioner responded: "At no time do I recall HART ever asking me if I would like to be moved to another location of the Cimarron Units [sic] general population." Pet. App. 26. Hart argued that this response only showed a lack of memory of the event, which was insufficient to raise a dispute as to the fact. *See, e.g., I.V. Servs. of Am., Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51, 55 (1st Cir. 1999) (plaintiff's "mere lack of recollection does not suffice to create an issue of fact").

The core of Petitioner's argument in this Court is that the facts were actually in dispute:

> Relying on Hart's contention that he offered to move Fisher the Ninth Circuit disregarded evidence that when Hart allegedly made that offer, he also assured Fisher that the two threatening inmates would be segregated. Contrary to Hart's assurances, both inmates were tested for drug use – thereby exposing Fisher as an informant – and both were returned to Fisher's unit. Only Psycho was eventually detained. Hart did not even provide Fisher with a warning, much less renew his alleged offer to move Fisher in light of these changed circumstances. Moreover, the prison's own internal policies required Hart to move Fisher upon receiving knowledge that Fisher's safety might be in jeopardy. Hart failed to do so. *On these facts, the Ninth Circuit improperly concluded that Hart responded reasonably as a matter of law.*

Pet. at 10 (emphasis added); *see also id.* at 14 (arguing that "a jury could justifiably find [Hart's response] so minimal and misleading as to fail the *Farmer* standard").[1]

In other words, the Petitioner is complaining simply that the evidence was not uncontroverted, summary

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[1] To the extent the Petition equates *Farmer* reasonableness with simple negligence, it is incorrect. *See, e.g., Farmer*, 511 U.S. at 835 ("deliberate indifference describes a state of mind more blameworthy than negligence"); *cf. Daniels v. Williams*, 474 U.S. 327, 328 (1986) (prison official's negligent failure to protect inmate does not violate due process).

judgment was improper, and the case should have been left to a jury. This is consistent with his argument below:

> Summary judgment based on Hart's alleged offer to move Mr. Fisher was improper for a variety of reasons. Most fundamentally, Mr. Fisher disputes that Hart made any such offer. In his affidavit, Mr. Fisher stated: "At no time do I recall Hart ever asking me if I would like to be moved to another location of the Cimarron Units [sic] general population." ER 231. Hart asserts in his interrogatory responses that he offered to move Mr. Fisher to "the North Yard." ER 185. One says the offer was made; the other says it was not. Because Mr. Fisher was the nonmovant in the district court, his version of the facts must be accepted as true. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Appellant's Supplemental Reply Brief at 10.[2]

Even assuming that the Petitioner is correct, at most this merely demonstrates a failure to conduct the proper summary-judgment analysis by resolving fact disputes. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine whether there is a genuine issue for trial"). Thus, this case is inappropriate for certiorari. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted

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[2] As noted, Petitioner's inability to recall Hart's offer does not create an issue of fact. *See I.V. Servs.*, 182 F.3d at 55.

error consists of . . . the misapplication of a properly stated rule of law.").

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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